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[17,385.]

Supreme Court of the United States.

OCTOBER TERM, 1899.

Louis Loeb,

Plaintiff in Error,

No. 276.] *vs.*

The Trustees of Columbia Township, Hamilton County, Ohio,

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

On November 4, 1897, the plaintiff, Louis Loeb, filed a petition in the Circuit Court of the United States for the Southern District of Ohio, Western Division, in an action at law against the Trustees of Columbia Township, Hamilton County, Ohio (R. 1.); alleging in substance that he is a citizen and resident of Indiana; that defendant is a citizen and resident of Ohio; that the legislature of Ohio passed a certain act to widen and extend a certain street in said township called Williams avenue; setting out the action of the trustees of the township taken under that act; the execution in due form of certain negotiable coupon bonds of the township and their sale to the highest bidder for $13,325 and

accrued interest, to a *bona fide* purchaser in advance of the making of the improvement, all in accordance with the said act; that plaintiff is the *bona fide* owner and holder for value of said bonds to the amount of $2,500, with certain unpaid coupons thereon; that the bonds matured and were presented for payment, but the township refused to pay, and judgment thereon was accordingly prayed (R. 2 to 9).

The defendant demurred generally to the petition, alleging that it did not state facts sufficient to constitute a cause of action (R. 11).

On January 13, 1899, the following judgment was rendered:

"This cause coming on to be heard upon the demurrer of the defendants herein to the petition, having been argued by counsel, and the court, being fully advised in the premises, upon consideration whereof find that said demurrer is well taken and sustains the same.

And thereupon, the plaintiff not asking to plead further, the court finds that the plaintiff hath no cause of action nor claim in the premises, and it is ordered by the court that the defendants go hence without day and recover from the plaintiff their costs herein expended; to all of which the plaintiff excepts (R. 23).

A question may be raised at the threshold as to whether we are properly in this court. The proceedings in error beginning with the petition for writ of error which are set out on pages 24 to 28 of the record, were filed in this court on April 27, 1899 (R. 28). Like proceedings in the same cause were filed in the United States Circuit Court of Appeals, Sixth Circuit, on June 16, 1899. The reason for so filing proceedings in both of the courts was, that while questions were in fact involved and decided in the cause as the same was tried in the Circuit Court, which entitled the plaintiff in error under section 5 of the Act of Congress creating said Court of Appeals to bring such proceedings in error directly to this court, yet the record does not disclose such questions except

as they arose and appear by the demurrer to the petition and the decision of the District Judge (R. 11 to 23). On October 25, 1899, a motion was granted in the Circuit Court of Appeals, continuing the cause until this court shall take action upon the proceedings brought here.

It is not our purpose at this time to argue the question of whether the plaintiff is rightfully here, because we propose to ask the court for the allowance of a writ of *certiorari* to bring the cause so pending in the Circuit Court of Appeals into this court, and further we understand a similar question arising in the case of *The C. H. & D. Ry. Co., Plaintiff in Error*, v. *Thibaud, Administrator, Defendant in Error*, to have been certified to this court by our Circuit Court of Appeals, which, we assume, will be decided before this cause is reached. It is submitted that the demurrer raised all questions in law, the same as if they had been expressly and formally pleaded, which could be raised against the right of the plaintiff to recover, and that the judgment for defendant upon the demurrer necessarily passed upon those questions.

The opinion of Judge Thompson of the Circuit Court (Record, pp. 14 and 15) shows the points urged in support of the demurrer by defendant—the first two being as follows, viz:

> 1. That the petition did not show that the plaintiff was the original holder of the bonds sued on, and if he were an assignee or subsequent holder thereof he was not entitled to maintain the action because the bonds were payable to bearer and were not made by a corporation.
>
> 2. That the act (which we will call the Williams Ave. Act) under which the bonds were issued contravened the Constitution of Ohio.

As to these two points there was full argument orally and by briefs. The opinion of Judge Thompson, on pages 15

to 25 of the record, sets out the argument open to plaintiff so fully that we do not think we can add to it, and therefore beg to refer to it as our argument and briet on those two points.

The defendant in support of the demurrer also claimed that the Williams Avenue Act was wholly void, because the assessment feature of section 3 contravened the 14th Amendment of the Constitution of the United States, by permitting the taking of private property without due process of law.

In answer plaintiff claimed that while the abutting land owners might complain of the assessment, the township had no right to complain, as the provision was for the benefit of the township as against the abutters. But even if the township could complain and the assessment clause in Section 3 were invalid, yet the rest of the act would be unaffected and the debt of the township would remain a valid and enforcible obligation.

These contentions, unlike the two first mentioned, were not argued fully by either side. They were not much more than stated. The decision in *The Village of Norwood* v. *Baker*, 172 U. S., p. 269, had not then been rendered by this court.

The theory on which Judge Thompson reached his decision declaring the act invalid is shown from the following part of his opinion:

(See p. 26 of Record) "I think it was an essential part of the general purpose of the act in question that the expense of the improvement should be borne by the abutting land owners, and I do not believe that the legislature would have enacted the law with the assessment clause stricken out. The assessment clause was in line with the general legislative policy as evidenced by many acts providing for similar improvements passed since 1880—it was part of the general purpose of the act to make the improvement at the expense of those presumed to be most benefited thereby, to wit, the abutting land owners, and it is not to be assumed that the legislature would

have passed the law without some special provision requiring them to bear the expense. It cannot be said, therefore, that the assessment clause of this act is separable from the other provisions thereof in the sense that the general purpose of the act could be carried out if that clause were omitted therefrom."

To uphold the act with the special assessment eliminated will do justice. To invalidate it, on the other had, will work injustice.

Specification of Errors.

The assignments of error are set out in detail at pp. 24 and 25 of the record. Those we wish chiefly to argue in this brief are:

1. That even if section 3 of the Statute of Ohio referred to in the petition be treated as in violation of the Fourteenth Amendment as decided by the court below, yet it was error in that court to hold that the section was not severable from the rest of the act, and so to refuse to treat the other sections providing for the improvement and the bonds to pay for the same as a complete act, without respect to such third section authorizing a special assessment.

2. That the court erred in construing said section 3 to authorize an assessment in excess of benefits and so holding it to be violative of the Fourteenth Amendment and void for that reason.

ARGUMENT.

I.

A contractual obligation of the township to pay its bonds through general taxation arises out of the authority to issue them independently of the provision to levy a special assessment therefor.

The statute in question is to be found in volume 90 of Ohio Local Laws, p. 251. The main purpose of the act was to provide a certain highway; and not to give an opportunity to levy a special assessment. All its provisions are directed toward the acquisition of a highway. The question here to be determined, assuming for the purpose of argument that the provision for the assessment of the cost of the improvement is in violation of the Fourteenth Amendment, is, whether the invalidity of that provision is such as to render the whole act invalid. There is a complete scheme for the accomplishment of the intent of the act if the assessment provision be omitted. Section 1 of the act describes the improvement and the place for its location. Section 2 provides a method for acquiring the land, and section 4 provides for the issue of bonds to raise money to pay for the improvement. Section 3 provides for a special assessment. It is to be observed that the raising of money from the issue and sale of bonds to pay for the expenses of the improvement was intended to precede, and according to the petition in fact did precede, the levying of an assessment; indeed, under the constitution of Ohio the money had to be raised to pay for the appropriation of land before it could be taken for the purpose of the improvement. Necessarily then the intent of the act was to provide for the sale of the bonds before the completion of the proceedings to appropriate the land, and

consequently before the construction thereon of the street improvement itself. The result is that the essential purpose of the act was accomplished before the assessment was thought of; that is, the bonds were issued and sold, the money raised, and the improvement made and paid for prior to the making of the assessment. Our contention is that the scheme and intent of the act accorded with this succession of events, and that the assessment was in no sense an essential part of the main purpose to secure a highway.

It may be urged that the bonds are then outstanding and unpaid, that if no valid assessment can be levied upon the property there is no provision for the payment of the bonds, and that it is not to be presumed that the general assembly would have passed an act without some such provision.

But the bonds to be issued were those of the township; the liability of the township upon them from the moment of their issue was complete unless invalidated by the subsequent failure of the assessment. True, the object of the assessment was to provide a fund to reimburse the township for expenditures or to liquidate the liability which had been incurred. The holder of the bonds is not, however, required or expected to look to the owners of abutting property for the payment of his bonds; he can only look to the township, and can have no remedy against the property holder if the trustees of the township should fail or refuse to levy the assessment. He is the holder of an unconditional promise of the township to pay a certain sum of money at a day certain, with interest at a specified rate payable at fixed intervals. There is no connection, no privity between him and the persons assessed. In short, he has nothing to do with the assessment.

If the assessment fail, there is a method by which the township trustees can raise the money necessary to pay the interest and redeem the bonds, which is by a general levy upon the property of the township. This is the answer to a claim that the legislature would not pass such an act without

some provision for the payment of the bonds. The legislature knew the bonds would be good at the time of their issue and sale. The township was made liable for them in any event, but also believing it to be just that the abutting property should bear the whole or a part of the expenses of improvement, provision was made for an assessment; but to say that this assessment was a necessary part of the scheme to secure the improvement, is to say that the legislature did not realize that the power to issue the bonds in advance was to bind the township no matter whether the assessment was levied and collected or not. The power granted to issue bonds "*of the township*" was sufficient to authorize the creation of a debt of the *quasi corporation*, and the grant of the power to such a body to create an indebtedness necessarily implies the obligation to pay it from the only resource ordinarily open to it—taxation of the property in the township. This has been expressly declared to be the doctrine of Ohio by its Supreme Court. *State* v. *Commissioners*, 37 Ohio St. 526. The statute there authorized county commissioners upon the petition of certain landholders to construct county roads and to levy special assessments to pay for the same; also to issue bonds to raise the money necessary to meet the expenses of the improvements. Section 7 provided, among other things:

"And the said assessment shall be divided in such manner as to meet the payment of principal and interest of said bonds, . . . and when collected, the money arising therefrom shall be applied to no other purpose but the payment of said bonds and interest. . . ." (64 Ohio L. 80.)

Under this act, certain county commissioners upon petition of land owners adopted proceedings for the construction of a county road, issued bonds to pay for same, and levied an assessment. The assessment, however, failed as to certain of the property holders, and the bonds could not be paid in that way for that reason. Suit being brought on the bonds, de-

fense was made that the commissioners could not raise funds by taxation upon all of the property, but were restricted to a levy by way of assessment upon the lands specially benefited. The defense was overruled and the county held liable upon the bonds as an independent debt. McIlvaine, J., in the course of the opinion, at p. 529, said:

"The question of the power of the commissioners to obligate the county, is, however, raised on the statutes to which reference is made in the bond. The holder of the bond is notified by its face, that the power assumed by the commissioners is to be found in these statutes. Section 7 of the statute provides, 'That for the purpose of raising money necessary to meet the expenses of such improvement, the commissioners of the county are hereby authorized to issue *the bonds of the county*, payable in installments, or at intervals not exceeding in all five years, bearing interest at the rate not to exceed seven per cent per annum, payable semi-annually, which bonds shall not be sold for less than their par value.' From the language of the statute here quoted, perhaps no one would deny that the debt evidenced by the authorized bonds is the debt of the county in its *quasi* corporate capacity—indeed, the language is not susceptible of any other meaning; but, inasmuch as the same section provides for an assessment upon the lands specially benefited and lying within two miles of the improvement, to meet the payment of the interest and principal of the bonds, it is contended that no other mode or manner of taxation can be resorted to for the purpose of paying the bonds. However plausible this contention may be, we think it cannot be maintained. That the legislature might have so provided, we do not deny, but if such was the intention, it should have been expressed in very clear and unmistakable terms. Such terms were not used, nor is such inference clear. On the other hand, the liability of the county in its *quasi* corporate capacity is expressed in apt and unmistakable words; and if for such liability a portion only of the taxable property of the county can in any event be taxed, such intent on the part of the legislature should have been expressed in like apt and unmistakable terms. As

between the county and the taxing district created by the statute, to wit, 'the territory within two miles of the road improvement,' it cannot be doubted that the intent of the statute was to impose the burden of the improvement upon the latter; but as to the creditor holding bonds issued to meet the expenses of the improvement, the faith of the county to the extent of all its taxable property was pledged, by the express authority given to the commissioners to issue therefor 'the bonds of the county.' Whenever, therefore, payment of the bonds cannot be provided for, by local assessment under the statute, it is the duty of the commissioners to make provision for their payment, as for the payment of other debts of the county, by a levy upon all the taxable property of the county."

It is true there was no question of constitutionality in that case, but the assessment failed because there was not the requisite number of petitioners for the improvement; see

Hays v. *Jones*, 27 Ohio St. 218;

in other words, because the commissioners had no jurisdiction to proceed with the improvement, yet the court held the county liable upon the bonds for the reasons above stated.

And this court itself, in *United States* v. *Ft. Scott*, 99 U S. 152, held that bonds issued under an ordinance which declared in express language that they should be paid out of special assessments, were nevertheless an independent and collectible debt even though the special assessment fail in whole or in part.

Mr. Justice Harlan (at p. 159) said:

"It is true that sec. 17 declares that 'for the payment of said bonds' assessments shall be made 'upon the taxable property chargeable therewith;' that is, 'on all lots and pieces of ground to the center of the block, extending along the street or avenue, the distance improved.' But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the

statute, comply with *its* promise to pay the bonds, with interest, at maturity. As between the city and its tax-payers, it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. *Hitchcock* v. *Galveston*, 96 U. S. 341."

And further, on the same page, after speaking of the declaration of the ordinance that the principal and interest of the bonds should be paid solely from the special assessments, the learned justice said:

"There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted."

A comparison of the statutes involved in that case and in *State* v. *Commissioners*, *supra*, with the statute in question here, will show a striking similarity of provisions touching the issue of the bonds; especially is this true as between the statute passed on in *State* v. *Commissioners* and the present one.

We cite these cases for the purpose of showing that the power granted the trustees of Columbia Township to issue the bonds of the township, authorized them to create a debt independent of the assessment; and that by virtue of such issue, to paraphrase the language of Judge McIlvaine, the faith of the township to the extent of all its taxable property was pledged by the express authority given to the trustees to issue "the bonds of the township."

Such being the case, it necessarily follows that there was sufficient provision for the payment of the bonds and interest, without regard to the assessment. The two are not interdependent, but separable. The scheme was complete with-

out any assessment, and we therefore most earnestly contend that the legislature cannot be held to have intended that the construction of the improvement should depend wholly upon the assessment. What they were determined upon securing was the avenue; that is shown by the very fact that they made a double provision for the payment of the cost of the improvement.

It is further shown by the imperative language of section 1 of the act authorizing and requiring the trustees to widen and extend Williams avenue. It is also to be remembered in this connection that assessments are notoriously uncertain of collection. The books abound with reports of cases in which they have been held invalid for various reasons, and even when valid, the amount realized from them is often less than the amount required to pay for the improvement, because the property assessed is not of sufficient value to yield the necessary amount. Illustrative of this, see recent decision of Ohio Supreme Court in *Walsh* v. *Barron, Treas.*, 42 Weekly Law Bull. 302. All of this can be fairly presumed to have been known to the legislature; and when that body passed an act imperatively commanding the construction of Williams avenue and the payment of the cost by the sale of obligations of the township, in effect pledging all its taxable property as security for their redemption, with a provision looking to the reimbursement of the township from the proceeds of an assessment, we submit that it cannot be fairly held that the legislature would not have passed the act if this latter feature had been omitted.

This is manifest, too, from the decisions above referred to, which show that the failure of the assessment does not invalidate the bonds. It is to be presumed that the legislature knew this to be the law when they passed the act in question.

To the suggestion made in the decision of the court below in support of its ruling that the assessment was an essen-

tial part of the act and so prevented severability, that the assessment clause was "in line with the general legislative policy, as evidenced by the many acts providing for similar improvements passed since 1880," there are several answers. In the first place, as said in *Hadden* v. *Collector*, 5 Wall., at page 107:

"What is termed the policy of the government with reference to any particular legislation, is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes."

In the next place, the policy of providing for township or county road improvements without provision for special assessments, is declared by a number of general statutory provisions of Ohio, notably R. S. sec. 4677 (Bates' Ohio Statutes):

"The trustees shall, at their next meeting, cause a report to be read, and if the same be in favor of establishing the road and the trustees deem it reasonable and just, they being satisfied that the compensation and damages, if any have been claimed and assessed, are just and equitable, and that the road would be of sufficient importance to the public to cause the same to be paid by the township, they shall order the same to be paid to the person or persons entitled thereto from the township treasury, but if in the opinion of said trustees, the road is not of sufficient importance to the public to cause the same to be paid by the township, they may refuse to establish such road unless the compensation and damages which have been allowed and assessed, are paid by the petitioner, or said trustees may, in their discretion order a portion of such compensation and damages to be paid out of the township treasury and require the petitioner to pay the remainder thereof before such road is opened."

See also sections 2829, 4686–18.

It is fair to assume that the legislature intended the special assessment clause to be incidental, for if it had meant that it should be essential it would have used language mak-

ing the obligation of the bonds depend on the collection of the necessary amount from special assessment, but it does not expressly or by implication say that the bonds shall not be paid unless the assessments are collected. Having used language which can clearly be held to make a township obligation independent of the special assessment, the legislature manifestly intended it to have that effect. Having made provisions complete and capable of enforcement without the special assessment clause, it seems certain that it was intended that these provisions were to be enforced, if necessary, independent of the special assessment clause. The provision might have been that the assessment should be the sole source and means of payment; but unmistakable language would be required to justify a construction at once so unusual and harsh.

Act severable.

If the decisions before cited are apposite, if our contention thus far is at all correct, it inevitably follows that the statute is severable in the sense that the assessment provision may be eliminated and the rest of the act enforced in accordance with the main purpose of the legislature.

The rule on this subject is too well established in this court to justify, much less require, elaboration.

In *Supervisors* v. *Stanley*, 105 U. S. 305, at page 312, Mr. Justice Miller said on this subject:

"The general proposition must be conceded, that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be discarded.

In *Railroad Companies* v. *Schutte* (103 U. S. 118), decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. 'It is contended,' said the court, 'that as the provision of the act in respect to the execution and exchange

of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fall. We do not so understand the law.' And yet this was a case in which the scheme of exchanging the bonds of the state for the bonds of the company, in order that the company might get the benefit of the better credit of the state, was accompanied by a mortgage created alone by the statute in favor of the state as her security; and the court, while holding that the exchange of bonds was void, as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same statute, was valid."

In *Baldwin* v. *Franks*, 120 U. S. 678, at p. 689, Mr. Chief-Justice Waite, speaking of an effort in *Presser* v. *Illinois* to invalidate the whole Military Code because of the alleged invalidity of two of its sections, said:

"But the court held that, even if the first two sections of the code, on which the objection rested, were invalid, they were easily separable from the rest which could be maintained. The objectionable sections related to the enrollment of the militia in the state generally, and the rest to the organization of eight thousand men as a 'volunteer active militia.' This evidently brought that case within the rule which controls the determination of this class of questions, that the constitutional part of a statute may be enforced and the unconstitutional part rejected, 'where the parts are so distinctly separable that each can stand alone, and where the court is able to see and declare that the intention of the legislature was that the part pronounced valid should be enforcible, even though the other part should fail.'"

The rule in Ohio is stated in *Treasurer* v. *Bank*, 47 Ohio St. 503, at 523, to be as follows:

The question arises, however, whether, if that portion of the section is declared wholly or in part unconstitutional and void, it may not result in invalidating the entire section. As one section of a statute may be repugnant to the constitution without rendering the whole act void, so, one provision of a

section may be invalid by reason of its not conforming to the constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject-matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for, the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other."

Bowles v. *State*, 37 Ohio St. 35, at p. 44.

In the last citation the Ohio Supreme Court approved of the rule as stated by Judge Cooley in his work on Constitutional Limitations, 6th ed., 211 :

"If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

The presumption of validity attaches to every part of a statute, and therefore if any part be invalid the presumption remains as to the rest, unless it be shown to be so connected with the invalid part that the former cannot stand.

In the present case the intent of the legislature to cause the improvement to be made, can be completely carried out, if the portion alleged to be unconstitutional be stricken from the act. In that case the improvement can be made and paid for; indeed this has been done. It is no answer to say that the legislative intent to assess the cost upon the property holders cannot be carried out, for the assessment was only furnished as one of the means to the end to be accomplished; and the legislature was so anxious to attain the result that the two ways of paying for the improvement were provided so that there could be no failure.

II.

Section 3 of present act only describes the property to be assessed—it does not provide a mode of assessment or that its amount shall exceed the special benefits. Its true construction is that it confers power to assess, but only to the extent of the benefits conferred, and this is the established rule of Ohio. The section is therefore valid. The record being silent as to assessments, there is nothing to show that one has ever been made, much less that it is in excess of benefits or that any one except the township would contest it.

In discussing this feature of the case we shall not overlook the recent decisions of the Ohio Supreme Court which in substance hold that mandatory provisions such as are found in the statute in question invalidate it.

State ex. rel. v. *Commissioners*, 54 Ohio St. 333.
Hixson v. *Burson*, 54 Ohio St. 470, 485.
State ex rel. v. *Davis*, 55 Ohio St., 15 at 18.

But the bonds in dispute were issued prior to any of those decisions. They were issued and sold September 29, 1894 (R. 2). The first of the decisions just cited was rendered March 31, 1896, the second one April 28, 1896, and the third one June 23, 1896 (see Ohio State Reports aforesaid).

Yet as early as the year 1880 the Supreme Court of Ohio determined the rule respecting mandatory provisions exactly the reverse of the rule laid down in the decisions just cited.

The State ex rel. v. *Commissioners*, 35 Ohio St. 458.
Kumler v. *Silsbee*, 38 Ohio St. 445 at 447, former case approved.

It is scarcely necessary to say in this court that this change of decision by the court of last resort of Ohio did not

affect the validity of these bonds; for they were issued and purchased, and rightfully so, on the faith of the original rule.

Douglass v. *County of Pike*, 101 U. S. 677.
Burgess v. *Seligman*, 107 U. S. 20.
Greene County v. *Conness*, 109 U. S. 104.
Anderson v. *Santa Anna*, 116 U. S. 356.
Rowan v. *Runnells*, 5 How. 134.
Louisville Trust Co. v. *City of Cincinnati*, 76 Fed. 296.

Following these decisions, the court below held, against the objection of defendant, that the bonds could not be invalidated by reason of such overruling of the earlier doctrine of the Ohio Supreme Court (R. 18, 20).

We are thus brought to the question of interpretation of section 3 of the act in dispute. The court below construed it to be in violation of the Fourteenth Amendment, relying upon *Norwood* v. *Baker*, 172 U. S. 269. The material portion of section 3 is this:

"The trustees shall receive reasonable compensation for their services, which shall not exceed the sum of twenty-five dollars each, which, with all costs and expense of constructing said improvement, together with the interest on any bonds issued by the trustees for the same, shall be levied and assessed upon each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned in section one (1) hereof, and shall be a lien from the date of the assessment upon the respective lots or parcels of lands assessed;" (90 Ohio Local Laws, 251).

Our contention is that the words "assessed upon each front foot of the lots and lands" merely describe the lands upon which an assessment shall be levied; and that they do not provide a mode of assessment or that its amount may exceed the special benefits the improvement confers. Our meaning can perhaps be more clearly displayed by contrasting this provision with the one which was construed

in *Norwood* v. *Baker*. The language of the law there construed—R. S., sec. 2264 (172 U. S. 272)—is that the assessment shall be "on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation either in proportion to the benefits which may result from the improvement or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement." This both described the property to be assessed and provided three modes for making the assessment. Where the last mode is adopted, as it was in the *Norwood* case, the difficulty arises which is pointed out in the majority opinion in that case. But the present act provides for an assessment only by defining the lands to be assessed, to wit, "upon each front foot of the lots and lands abutting." It does not enact that the assessment shall be by a uniform rate or that any land shall be assessed beyond the special benefits it derives from the improvement; it merely declares that each front foot shall be assessed. Assessed how? Assessed to what extent? We maintain that the land being thus pointed out, the assessment thereon shall be according to the fundamental rules and principles of local special assessments.

The Supreme Court of Ohio has again recently laid down the rule in this behalf. The case arose under statutes which display the point of our contention in a very clear way. On May 11, 1886, the General Assembly of Ohio passed an act authorizing certain improvements of streets and alleys to be made in cities of a certain class, and to levy assessments to pay therefor (83 Ohio Laws, 140). At that time section 2270 of the Revised Statutes limited assessments to twenty-five per cent of the value of the property as returned for taxation. But on March 21, 1887, another act was passed expressly providing that section 2270 should not apply to any improvement made under the act aforesaid of May 11, 1886. In passing upon the validity of an assessment which

was levied to pay for improvements made under this legislation, the Supreme Court of Ohio, in *Walsh* v. *Barron, Treasurer* (42 Weekly Law Bull. 302), unanimously declared, as appears by the syllabi prepared by the court, as follows:

"1. The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property.

"2. The amendment to the Taylor law by which the provision of section 2270, Revised Statutes, limiting assessments to 25 per cent of the value of the property as returned for taxation, is made not to apply to improvements under that law, cannot be construed to confer an unlimited power of assessment on the municipality in proceedings under the law. The power is still subject to the general principle which underlies all assessments for local improvements; and when an assessment is made in substantial excess of the benefits, it must be set aside and held for naught, subject, however, to the right of the city to have a new assessment made on accurate principles."

In the course of the opinion Minshall, J., said of the amendment which in terms rendered section 2270 inapplicable, and so induced the claim that the city council could assess to any extent it chose (pp. 305 and 306):

"It is fair to presume that in removing the limitation of this section, it was not the intention of the legislature to permit the city to disregard the fundamental principle which limits an assessment for benefits to the extent of the benefits conferred by the improvement on the land. There is no provision of the law which would indicate this. It must, therefore, be held that all assessments under this law must be limited to the benefits conferred, or it must follow that the legislature designed a palpable invasion of the rights of pri-

vate property, which is not admissible. In other words, in authorizing an assessment to pay for improvements under the law, the legislature had special reference to such assessments as would be no more than the proper proportion of the costs based on the benefits received.

The judgments must be reversed and cause remanded for further proceeding. And here it is proper to say, that if the facts stated in the pleading of Walsh are found to be true, the city is entitled to have a sum assessed upon each lot substantially equivalent to the special benefits conferred on it by the improvements, unless such sum has already been paid. In ascertaining this sum, the special benefits conferred on each lot as distinguished from those common to the public, are alone to be considered."

See also *Schroder* v. *Overman, Clerk, et al.*, 42 Weekly Law Bull. 296.

It will not escape observation that these decisions were made after the decision was rendered by this court in *Norwood* v. *Baker*, *supra*, and with express approval thereof. (Id., at p. 305.) It is proper to say, however, that substantially the same rule had been established by the same court long before.

Chamberlain v. *Cleveland*, 34 Ohio St. 551.

Raymond v. *Cleveland*, 42 Ohio St. 522.

It is to be observed that this fundamental rule of assessment according to benefits found expression long ago in an enactment of the General Assembly of Ohio, which must be read in connection with the power of assessment wherever created, in these words:

"And so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits to the property assessed." (R. S., sec. 2283.)

It is true that a play can be made upon mere words when severed from their connecting words or sentences, so as plausibly to urge that there is no distinction between the

words "by the front foot" and "upon each front foot;" yet the former words used in connection with the other language of the statute containing them (O. R. S., sec. 2264) have no function to perform except to describe a *mode* of assessment; whereas the words of the act now in dispute have no office to fulfill except to describe the *lands* upon which an assessment shall be made. When this difference is coupled with the recent decision in *Walsh* v. *Barron, Treasurer, supra*, not to speak of the other decisions, it seems to us manifest that the Supreme Court of Ohio, having only this question before it, would limit the amount of any assessment to the benefits conferred, and so sustain and not invalidate the act. This would leave the power to assess intact, and would only regulate the mode of its exercise. Plainly this relieves the present act from the criticism that private property could be taken under it without due process of law. The decision of the court below did not take these views of the act into consideration. It treated the decision in *Norwood* v. *Baker* as controlling.

There is still another distinction between the two cases. In the *Norwood* case a property owner was resisting an assessment against him and his property. In the present case no facts appeared to show that an assessment had ever been levied, much less resisted. No property holder is a party to the present case, or, so far as the facts appear, has ever objected to paying an assessment if one has been or shall be levied. When this case was argued the decision in the *Norwood* case had not been rendered; there was therefore no opportunity to call the court's attention to these distinctions. The point was urged, however, by plaintiff against defendant's objection in this behalf that it was no concern of Columbia township in this case whether a valid assessment could be made or not; that the assessment provision was for the especial benefit of the defendant and consequently pre-

sented a question which an objecting property holder alone could raise in a proper case.

We therefore maintain that the court below erred in holding the assessment provision to be invalid. If we are right in this, we scarcely need say that the decision below should be reversed upon this ground alone; for if the assessment provision be valid, the bonds also are valid, no matter whether an assessment has been levied and collected either in whole or in part or at all.

More than this, if we rightly interpret the decision in *Norwood* v. *Baker*, the statute under which the assessment was levied was not declared invalid, but merely the assessment. The judgment of this court affirmed that of the Circuit Court and the latter only enjoined the village from enforcing the particular assessment (172 U. S., at 271). The judgment of this court (at p. 279) affirmed the judgment below "upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits," etc.

Mr. Justice Harlan, at p. 293, said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question." (See further on that page and on p. 294.)

The result of that decision, as well as the one rendered recently by the Supreme Court of Ohio in *Walsh* v. *Barron, Treasurer*, not to speak again of the other kindred Ohio decisions, seems to us to be that the courts would apply to the statute in dispute that rule of construction which would harmonize it with the Fourteenth Amendment and not bring it into conflict with it. It is settled that where a statute is open to two constructions, one of which is opposed to a constitutional provision and the other in harmony with it, the

latter will be adopted. As said by Mr. Justice Harlan respecting the construction of a statute, in *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261, at p. 268:

"It certainly cannot be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction, which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution."

In *United States* v. *Coombs*, 12 Pet. 72, at p. 75, Mr. Justice Story said:

"If the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."

Parsons v. *Bedford*, 3 Pet. 433.

Hobbs, Assignee v. *McLean*, 117 U. S. 567.

United States v. *Cent. Pac. R. R. Co.*, 118 U. S. 235.

Burt v. *Rattle*, 31 Ohio St. 116.

State ex rel v. *City of Hamilton*, 47 Ohio St. 52, at p. 86.

Respectfully submitted,

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